Supreme Court, U.S.
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No. 95-1443

In the
Supreme Court of the United States
OCTOBER TERM, 1995

STORK BRABANT B.V. AND
STORK BRABANT, INC.,
Petitioners,

v.

JOSE D'ALMEIDA
and
GERRITSE PROJECTEN AND
ING. GERRITSE B.V.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT

I. GERRITSE'S RELIANCE UPON ARBITRATION AND FORUM SELECTION CLAUSES CONTAINED IN ARTICLES 11 AND 12 OF THE AGREEMENT IS MISTAKEN, SINCE GERRITSE IS NOT A PARTY TO THE AGREEMENT AND HAS NO RIGHTS THEREUNDER; AND THE AGREEMENT HAS NO APPLICATION TO STORK'S CLAIMS FOR INDEMNIFICATION AND CONTRIBUTION IN MASSACHUSETTS, WHERE THIS CASE SHOULD BE TRIED.

Respondent Ing. Gerritse B.V. ("Gerritse") commences its *Brief of Respondent in Opposition to Petition for Writ of Certio-*

rari, at p. 1, by commenting that the *Petition for Writ of Certiorari* filed by Stork Brabant, Inc., and Stork Brabant B.V. (collectively, "Stork"), "fails to address fully certain material facts, and misstates others." Although Gerritse then purports to "set[ ] forth a summary of relevant additional facts necessary to this Court's review of the pending *Petition*[,]" it fails to identify a single factual "misstate[ment]" contained anywhere in Stork's *Petition*. Worse than its unfounded criticism of Stork's *Petition*, however, are Gerritse's historically and legally incorrect assertions throughout its brief that it "entered into" or "signed" or is a "part[y]" to the September 1, 1975 Agreement ("the Agreement") between Stork and Jan Gerritse ("Mr. Gerritse"). *See, e.g., Brief of Respondent*, at pp. 2,3,7,9,10,11 and 12.

A. *Dutch Arbitrators Have Already Ruled that Gerritse Has No Rights Under the Agreement, and that They Have No Jurisdiction Over the Dispute Between Gerritse and Stork.*

Stork's *Petition*, at p. 7, correctly stated that when Mr. Gerritse signed the Agreement[1], he was doing business as "Gerritse Projecten." Stork's *Petition*, at p. 4, n.3, also correctly reported that respondent Gerritse *unsuccessfully* sought Dutch arbitration of Stork's claims for indemnification and contribution when it invoked Article 12 of the Agreement.[2] The Dutch arbitral tribunal held:

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[1] The Agreement is reproduced in the Appendix to Gerritse's *Brief of Respondent*, at pp. A1-A11.

[2] *Article 12 - Disputes*

12.1 Any disputes arising in connection with the agreement or any further agreement arising therefrom, including those which only one of the parties considers to be a dispute, shall be settled by an arbitral award.

12.2 Such rulings shall be rendered with due application of the arbitration rules laid down in the Rules of the Netherlands Arbitration Institute.

> Gerritse put forward insufficient proof with regard to the transfer of rights and obligations under the [A]greement of September [1,] 1975 from 'Ing. Gerritse Projecten' to 'Ing. Gerritse B.V.,' let alone with regard to Stork's acceptance of such a transfer.

(SA 12-13).[3]

The panel of Dutch arbitrators therefore concluded that it was "*without jurisdiction* to hear the claims filed by Ing. Gerritse B.V." (SA 22) (emphasis added), and said:

> [T]he arbitral tribunal considers itself incompetent to hear the dispute between Ing. Gerritse B.V. and Stork.

(SA 13).

Gerritse commenced the arbitration proceedings, and since "arbitrator[s] must ultimately pass on the outer boundaries of what is arbitrable[,]" their decision binds Gerritse on this point. *Acevedo Maldonado* v. *PPG Industries, Inc.*, 514 F.2d 614, 617 (1st Cir. 1975). Thus, the basic premise of Gerritse's argument in opposition to Stork's *Petition for Writ of Certiorari* is invalid.[4] But this is not the only shortcoming of Gerritse's *Brief of Respondent*. Its construction of the Agreement and characterization of Stork's claims are equally flawed.

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[3] The Arbitral Award is reproduced in the Supplemental Appendix to this *Reply*. References to Supplemental Appendix pages are to SA ____. References to Appendix pages from Stork's *Petition* are to App. A ____.

[4] The Court of Appeals erroneously adopted Gerritse's mistaken belief that it was a party to the Agreement (App. A.3) ("their contract included a forum selection clause"), and Judge Bownes followed suit in his concurrence (App. A.5) ("Stork and Gerritse signed a contract"), notwithstanding a contradictory record and appropriate argument from Stork. Gerritse now attempts to perpetuate that myth.

B. *The Agreement Has No Bearing on Stork's Claims for Tort-Based Contribution and Indemnification from Gerritse, and Does Not Oust the District Court of Jurisdiction.*

Article 12 is limited by its terms to "disputes arising in connection with the agreement . . . ," and in no way concerns Stork's third-party action for contribution and indemnification against Gerritse, the designer and manufacturer of the calender machine which is the subject of Jose D'Almeida's tort claim for personal injuries. *See, e.g., Fuller* v. *Guthrie*, 565 F.2d 259, 260-61 (2d Cir. 1977) (claim for breach of contract for personal services held arbitrable where contract called for arbitration of claims, etc., "arising out of or connected with" agreement; but tort claim for slander retained for judicial determination).

Mr. Gerritse correctly observed, by way of affidavit in the District Court, that the arbitration contemplated by the Agreement is of a type "which can and routinely does resolve *commercial disputes* . . ." (emphasis added). The Court of Appeals for the Sixth Circuit has affirmed the distinction between "commercial disputes" and tort-based third-party claims such as those presented here. *Noel* v. *S.S. Kresge Company*, 669 F.2d 1150 (6th Cir. 1982) ("*Noel*").

Noel involved a product liability claim brought by an Ohio resident who was injured while using a pair of pliers purchased at K-Mart. *Id.* at 1152. The Ohio plaintiff filed his action against K-Mart, and K-Mart in turn filed a third-party complaint for indemnification against its supplier, a Japanese trading company. *Id.* "The sale of the pliers [to K-Mart] was evidenced by two documents — an 'Import Order' . . . and a 'Sales Note'. . . ." *Id.* at 1152. The K-Mart Import Order called for the Japanese supplier to indemnify K-Mart, *id.*, while the Sales Note provided:

> Arbitration. In case of dispute arising the case will be settled in Osaka. The dispute should be settled as amicably as possible, failing which the dispute will be referred to the Japan Commercial Arbitration Association in Osaka or Tokyo.

Id. at 1153 (emphasis added).

The Japanese company "maintained that the dispute involved in the third-party action was subject to arbitration in Japan and that suit could be brought only in Osaka." *Id.* As reported by the Sixth Circuit, however, the district court concluded the arbitration provision contained in the Sales Note had no application to the indemnification claim. "*The [district] court found that this arbitration clause referred to commercial disputes, e.g.*, controversies over the quality or quantity of goods shipped, *but did not specify the forum for a claim of indemnification.*" *Id.* (emphasis added). Indeed, the district court further "found that nothing in the Sales Note qualified in any way K-Mart's right . . . to be indemnified against any claim for bodily injury arising from the use of the pliers." *Id.*

The Sixth Circuit affirmed the district court's analysis, saying that "the principal concern" of the arbitration clause, *inter alia*, was "with such *commercial matters*, as quality, quantity, packaging, inspection, licenses and duties, manner of shipment and payment . . . all matters which touch upon *commercial practices* related to international trade." *Id.* at 1155 (emphasis added). The Court concluded, "No such dispute arose between [the Japanese company] and K-Mart with respect to the pliers." *Id.* It then affirmed the plaintiff's judgment against K-Mart and K-Mart's judgment against its suppliers, saying:

> Since *the liability which K-Mart sought to enforce* against Greenhill *arose from a claim of bodily injury* which was tried to judgment in the district court,

> that court was not required to surrender jurisdiction to a Japanese court to try the indemnification claim. The language relied upon by Greenhill does not convince us that it was the intent of the contracting parties that such a claim, based on the judgment of a court in Ohio which concededly had jurisdiction over the underlying personal injury claim, was required to be submitted to a Japanese forum.

Id. at 1156 (emphasis added). Stork's third-party action, which seeks contribution and indemnification from Gerritse with respect to any judgment that D'Almeida obtains against Stork, is simply not a "commercial dispute."[5]

Like Gerritse in its *Brief of Respondent*, at p. 9, the Sixth Circuit also cited *M/S Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1 (1972) ("*Bremen*"), in *Noel* v. *S.S. Kresge Company*, 669 F.2d at 1155. That Court said it "[was] not unmindful of the deference which is required to be given to forum selection clauses negotiated and agreed to by contracting parties." *Id.* It acknowledged that "if the issue . . . involved a dispute between K-Mart and [the Japanese supplier] concerning performance of the sales contract, an agreement to settle the matter in Japan would be enforced . . . However, K-Mart made no claim that [its supplier] breached the contract of sale." *Id.* at 1156. "*[T]he liability which K-Mart sought to enforce . . . arose from a claim of bodily injury [in Ohio] . . . .*" *Id.* And, like the District Court in this case, the district court in *Noel* "had jurisdiction over the underlying personal injury claim," *id.*

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[5] Gerritse alludes to 9 U.S.C. §§ 201 *et seq.*, in its *Brief of Respondent*, at p. 12. That statutory provision concerns the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where the United States has exercised its option and declared that it will apply the Convention only to differences which are considered as "commercial". 9 U.S.C. § 201, Article I, ¶3, n. 58. This case thus falls outside the Convention, and the rule and reasoning of *Noel* should apply.

Article 11 of the Agreement,[6] upon which Gerritse also relies in his *Brief of Respondent*, is equally unavailing to him, for although it states that "[t]he agreement [is] governed by the laws of the Netherlands[,]" the liabilities of the parties arising out of a tort claim for personal injury in the United States are not. *See, e.g., Home Owners Funding Corp. of America* v. *Century Bank*, 695 F.Supp. 1343, 1346, n.2 (D. Mass 1988) ("as matter of law . . . this provision refers to the contract rights of the parties and in no way limits the application of Massachusetts tort and statutory law to them"). Furthermore, there is no provision in the Agreement concerning "cases" like the instant one, where the plaintiff, D'Almeida, has sued in an American Court and the Dutch courts simply are not and cannot "be involved."[7] In short, Stork and Jan Gerritse "did not have th[is] particular controversy in mind when they made their agreement" back in September of 1975. *Bremen*, 407 U.S. at 17.

C. *D'Almeida Supports Stork's Petition Because D'Almeida's Claims, and Stork's Claims Against Gerritse, Should Be Tried Together In Massachusetts.*

This particular dispute is an essentially local one to Massachusetts, inherently more suited to resolution there than in the Netherlands. *Cf. Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991). The very things which make trial of a

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[6] *Article 11 - Applicable Law*

11.1 The agreement shall be governed by the laws of the Netherlands.

11.2 The Dutch courts shall have exclusive competence in any cases in which a public judicial authority could be involved.

[7] Gerritse also invokes "the interests of the Netherlands," but the Dutch courts treat an American judgment as *res judicata* even where a Dutch defendant relies upon a contractual forum selection clause and raises jurisdictional defenses. Dutch decisional law to this effect was presented to the Magistrate Judge and made a part of the record.

case "easy, expeditious and inexpensive" are, in this case, found in Massachusetts. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947). The plaintiff, his eyewitnesses, expert witnesses, medical witnesses and medical records are all located in Massachusetts. The calender machine which is the focus of D'Almeida's and Stork's claims is located in Massachusetts. The plant where the accident occurred, Shawmut Mills, is located in Massachusetts, as are its records concerning the plaintiff, the machine and the accident. And plaintiff's claims are governed by Massachusetts law, as are Stork's claims for statutory contribution and common law indemnification against Gerritse.

"There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 509. This Court also stated in *Bremen* that "selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an *important public policy of the forum*." *Bremen*, 407 U.S. at 17 (emphasis added). Although this Court upheld the choice-of-forum provision in *Bremen*, it was careful to note that a "contractual choice of forum clause should be held unenforceable if enforcement would contravene a *strong public policy of the forum* in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 15 (emphasis added). Massachusetts' strong, expressed interest in applying its product liability law, rule of joint and several liability, and statutory right of contribution, are discussed at length in Stork's *Petition*, at pp. 17-20.

The District Court allowed that "it would be beneficial to have all parties involved in the occurrence litigate their claims in a single forum." (App. A34.) A similar sentiment was expressed in the Memorandum of Decision (App. A15, A16) that

accompanied the Order for entry of separate and final judgment (App. A10, A11). The District Judge wrote, "It makes sense, should the decision be reversed, to have Gerritse[] involved in both pre-trial and trial proceedings, so that all of the information can be exchanged at once, and so that all claims may be tried together in one forum." (App. A16.)

The *Brief of Respondent*, at pp. 2 and 9, only reinforces the wisdom of the foregoing observations when it states that "D'Almeida has never sought interlocutory review of the District Court's denial of his effort to add Gerritse as an additional defendant, and the First Circuit expressly limited its decision to the issues presented by Stork's claim[,]" and that "[s]hould D'Almeida in the future ever choose to appeal the District Court's denial of his attempt to add Gerritse as a defendant, the narrowly tailored holding of the First Circuit . . . will not limit D'Almeida on appeal." It is for these very reasons, and for those expressed in Stork's *Petition*, at pp. 19-20, that D'Almeida *supports* Stork's *Petition for Writ of Certiorari* (SA 25-26).

The fates of D'Almeida and Stork are inextricably linked. Because the Magistrate Judge reported that Stork had failed to present "a *prima facie* case of *in personam* jurisdiction over Gerritse[,]" she recommended that D'Almeida's motion to add Gerritse as a direct defendant be denied as "futile on jurisdictional grounds." (App. A35-36.) The District Judge followed her recommendation (App. A17). Later, the Court of Appeals affirmed the dismissal of Stork's third-party claims, saying the case would be "especially difficult" if D'Almeida had brought suit against Gerritse and if compensation for his injury had been "at stake." (App. A3.)

The result thus presents a procedural conundrum not present in *Asahi Metal Industry Co.* v. *Superior Ct. of California*, 480 U.S. 102, 114 (1987), where the plaintiff had settled his claims with all defendants. In this case, D'Almeida has been

prevented from suing Gerritse because Stork has not satisfied the lower courts as to *in personam* jurisdiction; and Stork has been unable to satisfy those courts because D'Almeida has not been allowed to sue Gerritse. The unfairness of this situation is palpable, and only this Court can rectify it.

Conclusion.

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Counsel for Petitioners

I hereby declare that the following is to the best of my knowledge and ability a full, true and faithful translation of the Dutch document annexed hereto, which was submitted to me for translation.

Hengelo (O), April 7, 1994

A.E.C.M. Beusink
Sworn in as a translator before the District Court of Almelo on December 2, 1987.

Netherlands Arbitration Institute
NAI 1552
March 30, 1994

ARBITRAL AWARD

in the case of:

1. TEXMACH B.V.

and

2. ING. GERRITSE, B.V.

both companies having their registered and business offices in Brummen, the Netherlands,
plaintiffs,
attorney: C.P. Aubel of Nijmegen;

versus

STORK BRABANT B.V.

having its registered and business offices in Boxmeer, the Netherlands,
defendant,
attorney: L. Hardenberg of Amsterdam

Arbitrators:
H.J.C. ter Kuile, residing in Olst
B.C.J. Sjollema, residing in Rotterdam
C.C.Th. van Andel, residing in Vinkeveen

The members of the arbitration tribunal, acting as good and reasonable arbitrators in conformity with Article 455d1 of the Rules and Regulations adopted by the Netherlands Arbitration Institute, have rendered the following award:

Indication of parties

1. The plaintiffs will be referred to individually as "Texmach" and "Ing. Gerritse B.V.", respectively, or collectively as the "plaintiffs". The defendant will be referred to below as "Stork".

Summary of the arbitral procedure

2. In their request for arbitration dated July 15, 1993, the plaintiffs filed their complaint. The appointment of the arbitrators was confirmed by way of a letter of appointment addressed to the arbitrators and dated August 23, 1993. The arbitrators accepted their appointment in writing.

Prior to the oral hearing of January 19, 1994, the parties submitted the following documents:

- the plaintiffs' request for arbitration along with one exhibit, dated July 15, 1993;
- a brief reply on Stork's part, dated July 29, 1993;
- the plaintiffs' statement of claim, dated October 21, 1993;
- the plaintiffs' additional statement of claim, undated (sent on October 29, 1993);
- Stork's statement of defence along with three enclosures, dated December 21, 1993;
- six exhibits on the plaintiffs' part, sent on January 10, 1994.

On January 19, 1994, an oral hearing was held before the arbitral tribunal in Amsterdam. This hearing was attended by the following persons:

- for the plaintiffs: Ing. J. Gerritse and the plaintiffs' attorney;
- for Stork: J.P. Witsen Elias (corporate counsel) and Stork's attorney;
- the arbitrators and P.J. van der Korst, Secretary.

Subsequent to the oral hearing of January 19, 1994 but prior to the oral hearing of March 2, 1994, the parties submitted the following documents:

- a letter from the plaintiffs' attorney with approximately 80 pages of enclosures, dated January 31, 1994;
- a reply, with 14 exhibits, from Stork, dated February 15, 1994.

The continued hearing took place on March 2, 1994 and was attended by the same persons who were present at the

oral hearing of January 19, 1994.
The plaintiffs' attorney defended his clients' case in further detail on the basis of a "brief reply to the motion contesting jurisdiction" and a pleading. Stork's attorney also defended his client's case by means of a pleading. The three documents were submitted to the tribunal.

Claims and defence

3. The plaintiffs made the following claims in their statement of claims and additional statement of claim:

"1. Stork Brabant B.V. should be ordered to immediately cancel the Third-Party Complaint filed in the U.S.A. against the plaintiffs and Stork should be ordered to pay a penalty of NLG 50,000 for each day that it fails to comply with this order.

2. Stork Brabant should be ordered to pay to the plaintiffs any and all damage which they have already suffered and will suffer as a result of their being wrongly involved in the U.S. procedure. This damage amounts to no less than NLG 111,416.77 and Stork should in any event be ordered by arbitral decision to pay this amount, increased by legal interest from this day until the day of final payment. Any additional damage still needs to be assessed in further detail.

3. The arbitrators should declare that Stork Brabant B.V. will be obliged to indemnify the plaintiffs against any disadvantage that has arisen or may arise for the plaintiffs from D'Almeida's assertions in the U.S. procedure that he was injured when handling a calender which Stork alleged had been

delivered by the plaintiffs to Stork Brabant B.V. This particularly applies to any detrimental effects ensuring for the plaintiffs from any complaint which D'Almeida may file against the plaintiffs in the U.S.A.

4. The arbitrators should declare that Stork Brabant B.V. will be obliged to indemnify the plaintiffs against any disadvantage that has arisen or may arise for the plaintiffs from the fact that Stork Brabant Inc. filed a Third-Party Complaint against the plaintiffs with the United States District Court for the District of Massachusetts, Boston, U.S.A.

5. Stork Brabant B.V. should be ordered to pay the costs of arbitration and any legal aid fees incurred by the plaintiffs with a view to these arbitral proceedings."

4. In its statement of defense, Stork concludes as follows:

"For these reasons, Stork demands that the arbitrators declare themselves incompetent to hear this case or that they reject the plaintiffs' claim for procedural reasons or on the merits. Stork further requests that the plaintiffs be ordered to pay the costs of arbitration, including the statement of legal fees to be presented by Stork's attorney."

Established facts

5. The following facts are established either on the grounds that they have been asserted by one party and have not been disputed or have been insufficiently disputed by the other party or on the grounds of the undisputed contents of the exhibits and enclosures:

a. In the course of 1992, a plaintiff, Jose M. D'Almeida, filed a complaint against Stork and Stork Brabant Inc. (a North American subsidiary of Stork established in North Carolina) with the United States District Court for the District of Massachusetts. D'Almeida claimed that on or about February 22, 1991, he had been injured when operating a metal stock straightening machine. D'Almeida alleged that Stork and Stork Brabant Inc. were liable for this injury as the parties who had marketed the injury inflicting machine (a calender).

b. In the framework of said proceedings, Stork and Stork Brabant Inc. filed a Third-Party Complaint against the plaintiffs and "Gerritse Projecten B.V." for the apparent purpose of requesting that the District Court order the plaintiffs and Gerritse Projecten B.V. to compensate Stork and Stork Brabant Inc. for any sums that they may owe to D'Almeida, as well as for the costs of the proceedings versus D'Almeida and those related to the Third-Party Complaint.

c. Stork and Stork Brabant Inc. claimed that the calender concerned had been designed, developed, manufactured and supplied by the plaintiffs and/or Gerritse Projecten B.V. and that the plaintiffs and/or Gerritse Projecten B.V. should therefore be called upon to hold Stork and Stork Brabant Inc. harmless.

d. At the end of April and the beginning of May 1993, the plaintiffs filed the "Motion of Texmach B.V. and Ing. Gerritse B.V. for dismissal or stay of

Third-Party Action" and a "Memorandum in support of Gerritse's motion to dismiss or stay", requesting that the District Court dismiss the Third-Party Complaint or to stay any decision in that respect pending the present arbitration procedure.

e. On June 1, 1993, Stork and Stork Brabant, Inc. filed their "Memorandum of Third-Party Plaintiffs Stork Brabant B.V. and Stork Brabant Inc., in opposition to motion for dismissal or stay of Third-Party Action", requesting that the plaintiffs' defence stated above in item d. be denied.

f. On October 6, 1993, D'Almeida submitted a motion to the District Court for leave to implead the plaintiffs and Gerritse Projecten B.V. in the principal action against Stork and Stork Brabant Inc.

g. The calender to which D'Almeida referred in the above-mentioned action had been ordered by Stork by telex of May 13, 1985 directed to "Gerco NL/Gerritse". By telex of June 10, 1985, signed by "Machinefabriek Gerritse B.V./J. Gerritse", a more detailed price quotation was given for the calender. Texmach billed for the delivered calender by way of its invoice to Stork, dated August 30, 1985.

h. On September 1, 1975, Stork and "Gerritse Projecten" had concluded an agreement (signed by Ing. J. Gerritse) concerning the development, manufacture and supply of calenders. Article 12 of this agreement contained an arbitration clause pursuant to which the arbitration provisions set

forth in the Rules and Regulations adopted by the NAI, the Netherlands Arbitration Institute, were declared applicable.

Jurisdiction of arbitrators

6. Since Stork invoked the arbitration tribunal's lack of jurisdiction for its entire defence, such on the grounds that the plaintiffs and Stork had not concluded a valid arbitration agreement, this arbitral tribunal, having summarized the parties' positions in this regard, will first rule on its own jurisdiction.

Summary of positions taken by the parties with regard to the tribunal's jurisdiction

7. Stork invoked the tribunal's lack of jurisdiction on the following grounds:

   a. Stork is not bound to either plaintiff under the arbitration clause set out in the agreement of September 1975.
   In 1975, Stork concluded an agreement with "Gerritse Projection", that is, with Mr. Gerritse. The relationships between the separate Gerritse companies, including the plaintiffs, are vague, but Stork believes that these companies have every appearance of being in fact only operating companies of Mr. Gerritse.

   b. The question as to who is the contractual party is not decided by the fact of who sends the invoices, but who accepts and performs the orders. The dispatch of invoices in the name of Texmach does not necessarily mean that the agreement of

September 1975 was valid between Stork and Texmach. The invoices contain no direct reference to the agreement. On the contrary, the invoices refer to the Smecoma Conditions, which provide for the exclusive jurisdiction of the court competent to hear civil law matters.

c. The question as to whether an arbitration clause may be invoked successfully against the defendant in the principal action who also acts as plaintiff in a third-party action can only be answered by the court judging the principal complaint in accordance with the procedural law governing that court.

d. In view of the nature of D'Almeida's complaint, the arbitration clause is not applicable.

e. As between the parties, the statutory requirement of written proof supporting the agreement has not been met (Article 1021 of the Dutch Code of Civil Procedure).

f. Stork's assertions in the U.S. procedure concerning the alleged contractual relationship established with the plaintiffs cannot be held against Stork in these proceedings, even insofar as these assertions can be regarded as deviating from the assertions put forward in these arbitration proceedings. In addition, in the U.S. procedure, Stork remained inconclusive about the question whether the agreement of September 1, 1975 had been continued with one or more of the plaintiffs and, if so, with whom. Furthermore, Stork remained vague about the legal ground underlying its request for a third-party action; it rather alluded to all conceivable

possibilities relating to that issue.

8. The plaintiffs argued that they had submitted for Gerritse Projecten (the sole proprietorship run by Mr. Gerritse) as party to the agreement of September 1975 (and therefore the arbitration clause) and that they had thus assumed the rights and obligations ensuing from the agreement.
The plaintiffs submitted the following grounds to defend their position:

a. Stork filed a Third-Party Complaint against the plaintiffs in the United States, as described above, on the basis of (inter alia) an agreement concerning the supply of calenders. The only agreement to which Stork could have referred was the above-mentioned agreement of September 1975 or any ensuing agreement.

b. The plaintiffs referred to the large number of invoices related to calenders supplied, including the calender concerned in these proceedings. These invoices were drawn up and sent by Texmach to Stork and were paid by Stork to Texmach. These invoices must have been sent for the supply of calenders under the agreement of September 1975.

c. The agreement concluded by Texmach and Stork on September 7, 1992 referred to the agreement of September 1975 and included the following statement: "By letter of February 28, 1989, Stork notified Texmach that the agreement would be terminated as of August 31, 1989."

d. The agreement of September 1975 was drafted by Stork; any ambiguity in the (wording of the)

arbitration clause and the parties bound by the clause must be construed against Stork.

Decision on the jurisdiction dispute

9. As concerns the jurisdiction dispute, the arbitral tribunal rules as follows:

- The agreement of September 1, 1975, including an arbitration clause, was concluded and signed by "Gerritse Projecten". At the time of conclusion, "Ing. Gerritse Projecten" was a business conducted by Ing. J. Gerritse in the form of a sole proprietorship; the plaintiffs' corporations had not yet been incorporated.

- In August of 1979, Texmach was incorporated. As evidenced by enclosures 9 and 11 of Stork's reply, "Ing. Gerritse Projecten" contributed assets and liabilities to Texmach and its operations were allocated retrospectively to October 1, 1978 to Texmach at the latter's risk and expense.
  Texmach was recorded in the trade register under the number which had formerly applied to "Ing. Gerritse Projecten".

- As evidenced by the invoices submitted by the plaintiffs' attorney in his letter of January 10, 1994, the calenders supplied to Stork, including the calender concerned in this case, were invoiced by Texmach.

- These invoices were paid by Stork.

- Stork (partly) based its Third-Party Complaint in

the U.S. action on the existence of a contractual relationship between Stork and the plaintiffs.

- The recitals of the agreement of September 7, 1992 between Stork and Texmach provided that Stork had terminated the agreement of September 1975 by way of its letter dated February 28, 1989 to Texmach.

10. In view of the foregoing, the arbitral tribunal holds that "Ing. Gerritse Projecten's" rights and obligations under the agreement of September 1975 were transferred to Texmach and that, after this transfer, Stork continued its relations with the manufacturer of the calenders without showing any concern about the identity of its contractual party or parties and without demanding that Stork's written consent be obtained for the transfer. Stork always accepted the invoices sent by Texmach for contractual performances rendered and Stork always satisfied its own contractual obligations towards Texmach. Therefore, the agreement of September 1975, including the arbitral clause set forth in Article 12, was continued between Stork and Texmach. Thus, there is a document which provides for arbitration and which has indeed been accepted by Stork.
Since the parties agreed on a separate arrangement in this respect, the general reference in Texmach's invoices to the Smecoma Conditions and choice-of-forum clause contained in those Conditions do not apply to the parties.

11. The arbitral tribunal is therefore competent to hear the dispute that has arisen between Texmach and Stork.

12. The plaintiffs put forward insufficient proof with regard to the transfer of rights and obligations under the agreement of September 1975 from "Ing. Gerritse Projecten" to "Ing.

Gerritse B.V.", let alone with regard to Stork's acceptance of such a transfer.

13. Therefore, the arbitral tribunal considers itself incompetent to hear the dispute between Ing. Gerritse B.V. and Stork.

Summary of assertions in support of the principal dispute

14. In view of the tribunal's ruling on the motion contesting jurisdiction, the arbitral tribunal will hereafter exclusively address the dispute between Texmach and Stork.

15. Texmach's claims can be summarized as follows:

- it requests that the tribunal order Stork to cancel the Third-Party Complaint against Texmach in the U.S. procedure;
- it requests that the tribunal order Stork to pay any and all damages that Texmach has suffered and will suffer as a result of its involvement in the U.S. procedure;
- it requests that the tribunal issue a declaratory ruling, stating that Stork must hold Texmach harmless from any detrimental effects ensuing from D'Almeida's allegations in the U.S. procedure that he suffered injuries when handling a calender which Stork believed had been supplied by Texmach;
- it requests that the tribunal declare that Stork must hold Texmach harmless from any detrimental effects ensuing from the fact that Stork Brabant Inc. filed a Third-Party Complaint against Texmach in the U.S. procedure;
- it requests that the tribunal order Stork to pay the costs of these arbitral proceedings.

16. In summary, Texmach justified its claims as follows: The Third-Party Complaint which Stork filed in the U.S. procedure was contrary to the arbitration clause in the agreement of September 1975. This arbitration clause limited the possibilities for the parties to make use of applicable general rules of procedural law anywhere in the world. In the agreement concerned, the arbitration clause was incorporated particularly to prevent the situation currently brought about by Stork. The relationship between the parties was of such a nature that Texmach was to supply Stork the calenders ordered by Stork and that Stork was to market these calenders worldwide at its own risk and expense, supplying them to end users. Any dispute which was to arise between Texmach and Stork about the supply of calenders would be settled and still must be settled by arbitration in the Netherlands.

17. Texmach also argued that the parties had agreed that Texmach would not be liable towards end users for any calenders supplied by Stork. Stork agreed with Texmach that Stork would take out product liability insurance and that it would protect Texmach through such insurance from any third-party claims. Texmach was only to be liable towards Stork for damage caused by errors in design and workmanship. Stork, however, had failed to put forward any facts and circumstances which would prove such damage.

18. In summary, Stork defended itself as follows against these allegations:
The arbitration clause in the agreement of September 1975 does not preclude Stork from filing a Third-Party Complaint against Texmach in the U.S. procedure. The purpose of a Third-Party Complaint (comparable with the concept of "vrijwaring" in Dutch procedural law) is to

settle a claim against a third party and the principal action to which the relevant claim is obviously connected as much as possible in one and the same procedure. This purpose also implies jurisdiction for the court which is competent to hear the principal claim.

19. In Stork's views, it is up to the court in the principal action to answer the question as to whether the arbitration clause precludes the impleading of Texmach. The court's answer must be given in conformity with the procedural rules of law governing the court. The judgment of the U.S. court, rendered after a fair trial and given subject to a statement of reasons, is binding upon the parties and has authority towards both the Dutch court and the Dutch arbitral tribunal.

20. Stork further argued that the arbitration clause related exclusively to disputes arising from the agreement concerned or any ensuing agreement. The complaint in the U.S.-procedure, which was filed by D'Almeida, however, was not based on any agreement between D'Almeida and Stork or between D'Almeida and Texmach, but was based on the U.S. equivalent of tort. The Third-Party Complaint should therefore have the same basis - tort - so that the arbitration clause does not apply to the dispute between the parties.

21. Stork defended itself against the third claim by asserting that such an unspecified and unlimited indemnification for Texmach's benefit would lack any justification, at least at this point of time. According to Article 7 of the agreement of September 1975, Texmach was to be liable in any event for any adverse effects caused by events which were, in brief, at Texmach's risk. Based on the assumption that D'Almeida's allegations were correct, Texmach would have

to hold Stork harmless rather than the other way around.

22. Finally, Stork contended that the fourth claim was incomprehensible and should be dismissed. Stork Brabant Inc. had nothing to do with the arbitration or the agreement of 1975. No judgment can be awarded against Stork for any act or omission on the part of this third party.

Determination of the main dispute

23. Texmach's claim for withdrawal of the Third-Party Complaint which Stork filed against Texmach must be reviewed against the background of the contractual relations between the parties. As evidenced by the wording of the 1975 agreement, Stork agreed:

> "to include the A-calenders ... forthwith in its sales programs, to purchase the from Gerritse at its own risk and expense and to sell or to have them sold on the international market" (Article 3.1)
>
> Furthermore, Stork agreed:
>
> "for that purpose (that is, to ensure continuity in sales) to refrain from seeking Gerritse's support for its commercial and service activities, unless this is deemed necessary with a view to developing the machines" (Article 3.3)

24. The wording of the agreement shows that the parties intended to cooperate to the extent that Gerritse was to manufacture the machines exclusively for Stork (Article 1.3), that Stork was to purchase the machines exclusively from Gerritse (Article 1.3) and that Stork could sell the machines on an exclusive basis (recitals of the agreement) on the international market, on the understanding that Stork

was to sell the machines in its own name and at its own risk and expense (Article 3.3).

25. With respect to agreements such as the present one, concluded between two parties established in the Netherlands and referring to arbitration in accordance with the rules adopted by the Netherlands Arbitration Institute (NAI), the parties could reasonably construe the arbitration clause in such a manner that any disputes between them would be settled by arbitration in accordance with the rules of the NAI and in principle to the exclusion of any court of law. The parties could also reasonably expect from one another that, in principle, they would not request court interference. Moreover, the agreement of 1975 provided that, if a court of law was nevertheless involved, the court concerned would exclusively be a Dutch court (Article 11.2). The arbitration clause, as construed above, implied that Stork, when sued before a (foreign) court on the grounds of a breach of tort, was not allowed to appeal to the same court for making any alleged claims against Texmach. Stork would have to submit its alleged claim to arbitrators in accordance with the rules of the NAI.

26. The disadvantage of this procedure is that, in (foreign) proceedings, Stork may have to forego the support on which it could have relief if it had been able to summon Texmach before the same court. Another disadvantage is that Stork, having been ordered by the relevant court to pay any sum of money, may not be able to fully or partially recover that sum of money from Texmach in the separate arbitration proceedings. However, in view of the nature of the agreement, these disadvantages will have to be accepted by Stork, which not only agreed to exercise its exclusive sales rights on the international market at its own risk and expense, but which also waived any performance by

Texmach other than the development and manufacture of the machines.

27. Against this background, the arbitral tribunal rules as follows with respect to the first claim. As evidenced by the Third-Party Complaint, submitted by Texmach through its attorney's letter of January 10, 1994, Stork's complaint in the U.S. procedure was filed (inter alia) to obtain a court order against Texmach for compensation of any and all damages and costs which Stork might have to pay to D'Almeida. As evidenced by the Third-Party Complaint, Stork based its claim against Texmach on the fact that Texmach had supplied the calenders to Stork.

28. With reference to the tribunal's consideration with regard to the motion contesting jurisdiction, the tribunal holds that the dispute submitted by Stork in the U.S.A. by way of the Third-Party Complaint against Texmach concerns the performance of the agreement of September 1975 and is therefore a dispute arising from that agreement or any ensuing agreement. Consequently, the dispute must be settled by arbitration as provided in Article 12 of the agreement.

29. By filing the Third-Party Complaint against Texmach, Stork failed to comply with its obligation to submit the dispute concerned to arbitration. Texmach will be afforded an opportunity to request that the arbitral tribunal order Stork to observe the arbitration clause and that any consequences of non-compliance with the arbitration clause be annulled. Therefore, the tribunal considers the first claim admissible. However, the tribunal also finds that there are reasons to mitigate the penalty demanded.

30. As concerns the second claim, the arbitral tribunal holds as

follows:
An arbitral award ordering Stork to compensate any and all damage which has been suffered and will be suffered by Texmach will be admitted only if and insofar as this damage can be attributed to Stork, that is, if and insofar as this damage is a result of Stork's submission of the Third-Party Complaint.

31. Texmach claimed compensation of damage already suffered, which "in any event" amounted to NLG 111,416.77 plus legal interest from October 21, 1993 to the day of final payment. In its statement of claim, Texmach specified this amount as relating to bills received from its Dutch law firm/counsel, the New York law offices of Stibbe simont Monahan Duhot and Ropes & Gray of Boston. These bills amounted to NLG 18,717.86, NLG 57,203.75 and NLG 35,495.16, respectively.

32. As concerns the amount of damages (NLG 111,416.77) specified by Texmach, the arbitral tribunal rules as follows: By way of its attorney's letter dated January 10, 1994, Texmach submitted a number of documents related to the U.S. procedure. According to the third enclosure to that letter, the Third-Party Complaint was served on Texmach on or about August 25, 1992. On or about May 3, 1993, the Third-Party Complaint was contested on behalf of Texmach, among others. it was not until July 15, 1993 that Texmach filed these arbitration proceedings through its attorney.

33. The arbitral tribunal has established that Texmach first defended its case in the U.S. procedure before submitting the complaint to arbitration.

34. The arbitral tribunal must therefore assume that Texmach

could have saved a considerable amount of the costs it wishes to have compensated if it had submitted the dispute to arbitration at a (much) earlier stage. Furthermore, in the absence of adequate specifications, the arbitral tribunal cannot assess what part of the costs specified by the plaintiffs must be considered as necessary to preserve Texmach's rights in the U.S. procedure.

35. In view of the foregoing, the arbitral tribunal requires additional information, for which purpose it intends to summon the parties to appear before the tribunal. The arbitral tribunal requests that, no later than two weeks before the date of appearance, Texmach send (copies of the) records related to the above costs both to the tribunal and to Stork. At the hearing before the tribunal, the possibilities of reaching an amicable settlement on this point will be investigated.

36. As concerns the third claim, the arbitral tribunal holds as follows:
Texmach's assertions are insufficient to clearly establish the facts underlying its claim for indemnification. The fact that D'Almeida contended in the United States of America that he had suffered injuries when handling the calender which Stork alleged has been supplied to Stork by Texmach is insufficient for a review of the question as to whether Stork is obliged to hold Texmach harmless from the resulting claim of D'Almeida. The tribunal is therefore of the opinion that the third claim should not be admitted.

37. As concerns the fourth claim (the sequence is based on the additional statement of claim), the arbitral tribunal rules as follows:
Stork has not contested Texmach's assertion that Stork Brabant Inc., incorporated in 1991, is a wholly-owned

subsidiary of Stork. In Article 13 of the 1975 agreement, the parties guaranteed that "legal entities and businesses over which they are deemed to exercise sufficient control shall comply with the obligations under the agreement."

38. The provisions of Article 13 of the agreement apply to Stork and Texmach to the same extent and on the same grounds as the arbitration clause; the tribunal refers to its considerations in that respect. Since Stork Brabant Inc., a wholly-owned subsidiary of Stork, failed to comply with the obligations under the agreement by filing the Third-Party Complaint against Texmach in violation of the arbitration clause, Stork will have to be held liable for any damage which Texmach may consequently suffer. Therefore, the arbitral tribunal considers the fourth claim admissible.

39. As concerns the fifth claim and Stork's request for an arbitral decision ordering the plaintiffs to pay the costs of these proceedings, the tribunal rules as follows:
In view of the contents of this arbitral award, where the tribunal has found for both parties on different points of action, the arbitral tribunal holds that each party will pay for their own legal fees and that the costs of arbitration will be divided equally among the plaintiffs and Stork.

40. The costs of arbitration, up to the time this award is deposited, will be as follows:

- Fees and out-of-pocket expenses of arbitrators	NLG 41,000
- NAI administrative fees	NLG 900
Total	NLG 41,900

The plaintiffs paid NLG 900 for administrative fees to the

Netherlands Arbitration Institute and deposited a sum of NLG 41,000 in fees and out-of-pocket expenses of the arbitrators. Stork neither paid any administrative fees to the Netherlands Arbitration Institute nor any deposit related to the fees and out-of-pocket expenses of the arbitrators. Said costs of NLG 41,900 will be set off against the payments made for administrative fees and the deposit. Therefore, Stork will have to pay the plaintiffs a sum of NLG 20,950.

Decision

The members of the arbitral tribunal, acting as good and reasonable arbitrators:

I. find themselves without jurisdiction to hear the claims filed by Ing. Gerritse B.V., but with jurisdiction to hear the claims filed by Texmach;

II. order Stork to withdraw the Third-Party Complaint filed against Texmach with the United States District Court for the District of Massachusetts within 30 days after this arbitral award has been deposited, all of this subject to a penalty of NLG 20,000 for each day that Stork fails to comply with this order, up to a maximum of NLG 800,000;

III. order Stork to compensate Texmach for any damage Texmach may suffer as a result of Stork's submission of the Third-Party Complaint referred to above under II, on the understanding that Texmach's damage still needs to be assessed;

IV. Order Texmach and Stork, accompanied by their counsels if so desired, to appear before the arbitral tribunal for the

purpose referred to in paragraph 35 of this award; the date and time of the hearing will be determined in consultation with Texmach and Stork;

V. declare that Stork shall hold Texmach harmless from any adverse effects that have resulted for Texmach or that may result for Texmach from the fact that Stork Brabant Inc. filed the Third-Party Complaint as referred to above under II against Texmach;

VI. order the plaintiffs and Stork, respectively, to pay half of the costs of arbitration as incurred up to the time this award is deposited, calculated at NLG NLG 41,000 for the arbitrators' fees and out-of-pocket expenses and NLG 900 for administrative fees charged by the Netherlands Arbitration Institute, totalling NLG 41,900; declare that these costs will be set off against the amount of NLG 41,000 deposited by the plaintiffs with the Netherlands Arbitration Institute and the amount of NLG 900 paid by the plaintiffs for administrative fees;

VII. order Stork to pay the plaintiffs a sum of NLG 20,950 on the grounds of the aforesaid cost allocation;

VIII. determine that each party shall pay for its own costs;

IX. stay any further decision.

Signed in quadruplicate originals and rendered in Amsterdam on March 30, 1994.

(Signed) (Signed)

H.J.C. ter Kuile C.C.Th. van Andel

(Signed)

B.C.J. Sjollema

March 21, 1996

William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Jose D'Almeida v. Stork Brabant B.V. and Stork Brabant, Inc. v. Gerritse Projecten and Ing. Gerritse B.V.
No. 95-1443
Our File No. 14917-1

Dear Clerk Suter:

Enclosed herewith please find an Appearance form on behalf of Enid M. Starr of the firm of Barron & Stadfeld, P.C., on behalf of the Respondent, Jose D'Almeida. Please be advised that we do not intend to file a response to the petition for a writ of certiorari.

I would like it noted in the record that the Respondent Jose D'Almeida, plaintiff in the underlying action, supports the petition and position of the Petitioners, Stork Brabant B.V. and Stork Brabant, Inc., first-party defendants in the action below. As set forth on pages 19 and 20 of the Petition for Writ of Certiorari filed by the Petitioners, the Respondent, D'Almeida, remains an active party plaintiff in the underlying action. The Respondent, D'Almeida, is a Massachusetts resident who was injured in Massachusetts and has an obvious interest in the outcome of this dispute. In the action below, D'Almeida moved to amend his Complaint to add the Respondent, Gerritse, as a defendant, but the motion to amend was denied on jurisdictional grounds.

Thank you for your cooperation and courtesy in this matter.

Very truly yours,

BARRON & STADFELD, P.C.

Enid M. Starr

EMS:cjl
Enclosure
cc: John T. Mongtomery, Esq.
John J. McGivney, Esq.